

# The Folly Of Mortgage Legislation: Just How Far It Has Gone

In New York, a lost-note affidavit may soon prove useless if servicers are required to be in possession of the original note.

by Bruce J. Bergman

New York is not the entire American mortgage market. It may not even be a microcosm of that market - but it is a very large and important segment. What happens there can serve as a guide to other states.

And there is indeed something happening in New York. Fueled by the media, and believing that borrowers have been set upon by all-powerful, oppressive lenders and servicers, the New York Legislature has proposed a new statute possessed of the strong potential to render it impossible to foreclose a mortgage if any original mortgage document has been misplaced or lost.

Although this part is only surmise, such an unacceptable consequence was not necessarily the intent of the proposed law. But it is what the statute seems to say, and unless it receives a liberal interpretation in the courts, many a foreclosure will be dismissed - forever made toothless - for want of an original document. Given that new foreclosure statutes have been interpreted with pointed strictness in New York, hope of a more accommodating judicial view would appear to be in vane.

So what is this new pending threat to mortgage enforceability in New York, which might also inspire laws in other states?

Legislative assessment concludes that in "many" instances, foreclosing parties do not actually own the loan being foreclosed. There is no evidence that any empirical study supports the conclusion. Nor is there a persuasive explanation of

why this concern merits remedial legislation. After all, the concept of "standing" to bring a mortgage foreclosure action has long been recognized: Lack of standing will defeat a mortgage foreclosure action. A borrower's attorney can oppose a foreclosure on this ground, and courts on their own can and do dismiss actions where standing is wanting.

In an apparent effort to expose the possibility of lack of standing in foreclosure actions, the proposed statute (among other things worthy of note but not for our purposes here) requires the foreclosing plaintiff to affirmatively plead that *originals* of the note and mortgage are in its possession. That sounds reasonable and inoffensive, but fails to account for the not uncommon actuality that a lender or servicer may have lost or otherwise misplaced either or both of these documents. It happens, innocently.

As for the mortgage, because it is a recorded document, a certified copy of the original is always available from the recording office. Because such a certified copy has always been the full equivalent of the original, having the original has never been critical, so if not retained in the file, it is of no consequence. By mandating the allegation of holding the original mortgage, the proposed law pretends barring foreclosure for want of that original.

A similar problem exists with the note. When an original is unavailable, a lost-note affidavit has always been an acceptable substitute. But this may prove useless when the statute insists upon

declaration of possessing that original note.

While the originator of a mortgage may not be prone to losing the note in its file, an assignment of the note and mortgage, or a chain of assignments, increases the peril of misplacing the document. Therefore, standard mortgage commerce will make it more likely that a plaintiff could not comply with the statutory imperative. And if it cannot comply, it appears that the ability to foreclose would be forever barred.

The statute then goes on to require that copies of the mentioned original documents be appended to the summons and complaint. If originals are gone, there may be an issue about certainty of the copies. More perilous, included in the documents to be attached are copies of the original assignments. Especially as the chain of assignments lengthens, the possibility of the original being lost increases.

But here, too, the statute disconnects from actual real estate practice. First, as a matter of law, a note and mortgage can be assigned by delivery of the documents alone. Thus, there may never have been an assignment, or one in the chain could be missing but of no legal consequence. Even where there have been assignments, which is typical, they are usually recorded. As with a mortgage, because it is a recorded document, retaining the actual original is not critical because a clerk-certified version suffices. And yet, this statute likely precludes the ability to foreclose for want of an original assignment.

Mandated, too, are original endorsements, which would include allonges. However, because a note and mortgage are assigned by an assignment or by delivery alone, neither an

endorsement nor an allonge is currently necessary. But, if they do not exist - and they needn't - the new statute would still bar foreclosure in their absence.

Because ever more dramatic foreclosure bills have been approved in New York, this one, which on its face appears to be benign, is very likely to pass. Requiring the possession and filing of original documents seems to be an eminently reasonable imposition. But it is not, because some documents may never have existed, and even if they did exist, commonplace real-life events may result in

their loss. And even where originals did exist, certain copies or other documents are an adequate replacement. The bill takes none of this into account.

The folly noted in the title and underscored by this disquisition is, in the end, the problem of very specific technical and practical information not being known by drafters of statutes. Mortgage foreclosure, particularly in judicial foreclosure states, is an exacting, complex and complicated calling. It is a combination of title law, litigation and real estate - with all the nuances and ob-

scurities attendant to each branch. Unless that expertise is diligently explored in the drafting process, the legislative product stands a good chance of being woefully deficient or, in this instance, dangerous. **SM**



Bruce J. Bergman, author of the three-volume treatise "Bergman on New York Mortgage Foreclosures," is a member of Berkman, Henoch, Peterson, Peddy & Fenchel in Garden City, N.Y. He can be reached at (516) 222-6200.